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CONCORD, N.H.

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Admiral C. A. Brinkmann, Director
Civil Defense
State House
Concord, New Hampshire

Re: Senate Bill #70

Dear Admiral Brinkmann:

In response to your request for my opinion
of the new Civil Defense law, Senate Bill #70 is enacted:

AS APPLIED TO THE STATE

1. Section 20. Appropriation. The authority to use the emergency fund is unrestricted, except for the required consent of the council, if the funds be applied to the purposes and objects enumerated in the act and after an emergency has been declared.

AS APPLIED TO CITIES AND TOWNS

2(a). As to whether a city council can authorize appropriation of such money as may be necessary to meet civil defense emergencies without holding a special election: normally an emergency requiring an immediate expenditure of money requires the town or city council to obtain permission of the Superior Court as provided by Revised Laws, chapter 51, section 5, as amended by Laws of 1943, chapter 37. Senate bill #70 would provide relief from this requirement except that if a city council appropriates funds under this act without prior approval of the Superior Court its action would appear to be subject to judicial review "in the light of exigencies of the extreme emergency situation". A city council acting under section 9(b) of the bill would appear to act at its peril if it should appropriate money and subsequently have it determined that the situation did not require such precipitate action. By Revised Laws, chapter 66, section 7, city councils are required to see that no money is paid from the city treasury unless previously granted or appropriated. Our courts have held that there can be later ratification of expenditures made without proper authority. In this connection it might be well to point out that specific authority to act in event of certain disaster highways is sent out in Laws of 1951, chapter 83, amending Part 13 of chapter 9 of the Revised Laws, as amended by chapter 174, Laws of 1947 and chapters 18, 79 and 215 of the Laws of 1949.

2(b). A political subdivision cannot exercise authority granted in section 9 in the absence of a state-wide emergency declared by the council or legislature. The emergency powers exist only during a state of civil defense emergency proclaimed as provided in section 7 of the proposed bill.

2(c). The mayor or local civil defense director cannot legally incur obligations prior to the council beyond the limit of funds previously appropriated and available.

2(d). Selectmen can authorize the diversion to civil defense emergency use of funds appropriated for and voted for other purposes.

2(e). Selectmen may not authorize the incurring of obligations beyond money already appropriated and available by action of the town. If they authorize the incurring of obligations they do so at their peril, subject to risk of later ratification by the town and subject to judicial review as to the necessity of such emergency expenditure.

No authority to exceed statutory municipal debt limits is given by this bill.

As to your query regarding "mandatory constitutional requirements" that are not waived by Article 9(b) of the bill: It is probably impossible to foresee all activities which might be undertaken by zealous town or city officials in the stress of emergency. The provisions of Part 1, Art. 10 of the New Hampshire Constitution, particularly as they relate to prohibiting expenditure of money raised for protection of the general welfare for a private purpose or use; the provisions of Part 1, Art. 12 relating to the reciprocal rights and duties of protection and taxation, particularly the right of the individual, insofar as opportunity permits, to determine what expenditures shall be laid against him as his share in the expenses of such protection; the provisions of Part 1, Art. 28 prescribing that taxes can only be levied by the people or legislature; the provisions of Part 1, Art. 29 limiting suspension of laws "only as the legislature shall expressly provide for"; the limitations on martial law imposed by Part 1, Art. 34 and the provisions of Part 2nd, Art. 51 limiting the powers and duties of the governor as commander-in-chief of the state's military forces appear to be some of the provisions of the constitution which directly curb action without regard to what the bill calls "time-consuming procedures and formalities prescribed by law". It is sufficient to say that the powers vested in the bill, regardless of the declared purpose, must be construed and executed within the framework of all constitutional provisions and limitations. In this regard I have in mind that a major fire, hurricane, earthquake or other natural causes will afford opportunity for considered action in most instances and will not impose expenditures accruing faster than the capacity of most political subdivisions to deal with them by the accustomed procedure after the initial needs have been met. On the other hand, attack or other hostile action will call into effect the exercise of national authorities and the war powers of the executives of the state and nation, with authority to suspend existing laws and to temporarily over-ride normal legal safeguards in militarily affected areas.

In short, the application of the provisions of Art. 9(b) to a particular situation requires an appraisal of the urgency of the need in order not to disregard customary procedures unnecessarily. What my grandfather used to call "horse sense" governs and the official who gets rattled and exceeds his normal functions unnecessarily does so at his personal financial risk.

Very truly yours,

George F. Nelson
Assistant Attorney General

GFN/T